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LETTER DATED 17 MARCH 1998 FROM THE PERMANENT REPRESENTATIVE OF BOSNIA AND HERZEGOVINA TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

I have the honour to present to you the text of the Supplemental Award of the Arbitral Tribunal for the Dispute over the Inter-Entity Boundary in the Brčko Area, dated 15 March 1998 (see annex).

May I ask for your kind assistance in circulating the present letter and its annex as a document of the Security Council.

(Signed) Muhamed SACIRBEY
Ambassador
Permanent Representative

98-07053 (E) 190398

/...

Annex

ARBITRAL TRIBUNAL FOR
DISPUTE OVER INTER-ENTITY BOUNDARY IN BRCKO AREA

The Federation of Bosnia and Herzegovina	)	
v.	)	Arbitration for the Brcko Area
The Republika Srpska	)	

SUPPLEMENTAL AWARD

15 March 1998

Appearances:

For the Federation of Bosnia and Herzegovina:

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Jay D. Zeller
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For the Republika Srpska:

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I INTRODUCTION

1. This Tribunal's Award of 14 February 1997 (hereinafter "the Award") established an international supervisory regime in the disputed Brcko region but concluded that it would be inappropriate at that time to make a judgment as to what "final allocation of political responsibilities . . . following the period of interim supervision" would best achieve implementation of the Dayton Accords and the development of representative local government in the Brcko area. Award Para. 104(II)(A). It also authorized either party to request, between 1 December 1997 and 15 January 1998, further action affecting the Award with respect to the allocation of political responsibilities in the area. Id. A timely request was made by the Federation; the Tribunal then conferred with counsel for the parties and adopted an agreed schedule for written submissions and oral hearings; eight full days of hearings were held in Vienna in the period 5-12 February 1998; and the parties' final written submissions were completed on 4 March 1998.[1]

II. THE ISSUES RAISED BY THE PARTIES

2. As indicated in the Award, the principal source of the legal and equitable principles that must guide this Tribunal is the General Framework Agreement for Peace in Bosnia and Herzegovina, referred to hereinafter as the "Dayton Accords". Under those Accords this Tribunal has a duty to allocate political responsibilities in the Brcko area in such a way as to give the fullest possible effect to Dayton's commands for country-wide freedom of movement, the return of displaced persons and refugees, the re-establishment of a multi-ethnic society, and the democratization of the political process -- all in the interests of

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[1] As of this writing the two party-appointed members of the Tribunal, Professor Cazim Sadikovic and Dr. Vitomir Popovic, have not joined in this Supplemental Award. Following the Vienna hearings, all three members of the Tribunal met and deliberated and exchanged views, and Messrs. Sadikovic and Popovic subsequently expanded their views in detailed letters to the Presiding Arbitrator. These documents make clear that a 2-1 majority decision now is impossible, with the result that "the decision of the Presiding Arbitrator will be final and binding upon both parties." See Award Para. 5.

regional and international peace. See Award Paras. 95-99. Under this mandate the Tribunal must "review the facts as to whether these principles are now being honored in the disputed area, and as to how such compliance might be assured in the future." Award Para. 83.

3. To ease inter-Entity tensions in the Brcko area and maximize the parties' compliance with the Dayton Accords during 1997, the Award provided for the installation of an international supervisor with authority to issue such orders and regulations as might be necessary to guide the parties toward full Dayton compliance and to promote and protect the legitimate interests of both parties in the Brcko area. In addition, the Award essentially put the parties on notice that in any further proceedings the Tribunal would pay close attention to the parties' subsequent compliance records. Accordingly, the central factual issues upon which both parties focussed their attention during the Vienna hearings were: first, the extent to which the parties had succeeded in achieving compliance with the Dayton Accords over the preceding 12 months; and, second, the degree to which each Entity could be expected to serve as a reliable "guardian" of the parties' interests in the future.

4. Without attempting here to summarize all of the hearing evidence, the main themes of the testimony were these:

(a) The Federation came forward with voluminous evidence to show that throughout 1997 officials of Republika Srpska ("the RS") -- in flagrant violation of the Dayton Accords and the Award -- stubbornly resisted all efforts by the Supervisor and the Federation to achieve, within the Brcko area, freedom of movement, the return of displaced persons and refugees, and the establishment of democratic multi-ethnic government. In light of this obstructionism, Federation President Ejup Ganic testified in support of the Federation's claim to have Brcko transferred to the Federation, arguing that such a step was necessary to achieve "justice" in two respects: all former residents of Brcko should be allowed to return and reoccupy their Brcko homes, and the Federation's citizens generally should enjoy an open economic gateway through Brcko to Croatia and the rest of Europe. Recalling that Serb forces ethnically cleansed the Brcko area during the war and asserting that, as evidenced by certain recent political developments noted below (see Paras. 9-11.

infra), the RS now is allegedly in a state of "disarray," the Federation argued that the RS cannot be trusted to adequately safeguard Federation interests in the area.

(b) At the hearings the RS laid heavy emphasis on its interest in territorial continuity (i.e., in maintaining the Brcko corridor connection between the RS's eastern and western halves), the theory being that maintenance of such a corridor under the exclusive control of the RS is absolutely vital strategically in order to allow (for example) RS armed forces to move as necessary throughout the Entity. To the RS, any thought of placing the Brcko corridor under Federation control is an anathema, particularly because of the alleged "disunity" within the Federation government.

III. DEVELOPMENTS SINCE THE FEBRUARY 1997 AWARD

5. As a threshold matter, in seeking to achieve an "equitable result" (see Award Para. 88), the Tribunal must consider the events of 1997 and the latest political developments as they may affect the Brcko area and the prospects of long-term compliance with the Dayton Accords. In reaching the decision articulated below, therefore, the Tribunal has relied upon the following facts established by the evidence submitted by the parties during the course of the arbitration.[2/]

6. In March 1997 U.S. Ambassador Robert W. Farrand was selected to serve as the Supervisor in the Brcko area. Since April, when he actually arrived on the scene, Ambassador Farrand and his staff have vigorously and skillfully pressed forward with the herculean task of building, from scratch, new programs for achieving real freedom of movement in the area, bringing about the return to Brcko of former residents (particularly Bosniac and Croat residents), creating a whole new system of multi-ethnic municipal government, and revitalizing the local economy.

2/ Given the decision articulated below, it is necessary here only to summarize certain key facts, rather than present detailed findings of fact.

7. Despite the tremendous efforts of the supervisory team, the hearing record clearly establishes that throughout the last year RS authorities in Brcko, directed by the Serbian Democratic Party ("SDS") headquartered in Pale, effectively resisted all of the supervisory programs looking toward Dayton compliance in the Brcko area. To give a few examples, the RS police in Brcko, acting on the orders of the Pale-controlled Minister of the Interior, systematically thwarted freedom of movement north of the IEBL in various ways including the use of illegal checkpoints and unjustified arrests; there was systematic intimidation of any Bosniacs or Croats who explored the possibility of returning to their former homes in the area; those few Bosniac and Croat families who still lived in the area were put under pressure to leave; on 1 May 1997, when a Bosniac group came to Brcko to confer with the Supervisor, they were stoned as they left, and no one was prosecuted; on 28 August 1997 a major riot and an attack, apparently sponsored by Pale, were launched not only on visiting Bosniacs but on IPTF, SFOR, and other international personnel, causing many injuries and great property damage, again without any subsequent prosecution; and in advance of the September municipal elections, the SDS caused such serious registration irregularities that the registration process had to be cancelled and restarted under increased international supervision.[3/] The apparent objective of all these Pale-sponsored Dayton violations was to maintain the Serbs-only "ethnic purity" of the region and thus completely frustrate the Dayton objective of returning Bosnia and Herzegovina to its pre-war multi-ethnicity.

8. This is not to say that the Federation's record of compliance with the letter and spirit of the Dayton Accords was perfect. For example, there is considerable evidence that Federation authorities have acted to inhibit the return of former Serb residents to Sarajevo and other communities within the Federation. The absence of full Dayton implementation in the Sarajevo area is particularly relevant because several thousand Serbs who formerly lived in Sarajevo are now living in the Brcko homes of Bosniacs and Croats who would like to

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3/ Even during the second registration the SDS caused such serious irregularities that election authorities imposed penalties on the SDS (whose first three candidates were removed from the party's list) and the head of the local election commission in Brcko (who was docked one month's pay).

return to Brcko -- but cannot do so because the Serbs occupying their Brcko homes are unable to return to Sarajevo. Thus while Federation authorities complain that the RS has been refusing to let Bosniac and Croat DPs return to Brcko, to a substantial degree they themselves are contributing to the problem. See generally Sarajevo Declaration of 3 February 1998. Nonetheless, during much of 1997 the RS's systematic resistance to Dayton in the Brcko area appeared clearly to be tipping the balance of the equities in favor of the Federation's claim to either exclusive or shared control of Brcko.

9. Although that was the situation through much of 1997, the political picture in the RS began to change in July of that year. A serious and public rift opened up between the SDS Pale leadership (including Messrs. Karadzic, Krajisnik, and Buha) and President Biljana Plavsic, who separated herself from the Pale group and set up her own headquarters in Banja Luka. While the old SDS nationalist anti-Dayton themes continued to dominate the political rhetoric in the eastern part of the RS and in Brcko, Mrs. Plavsic moved to a more progressive stance, separated herself from the SDS, formed a new party (the SNS), and began to embrace the Dayton Accords with apparent enthusiasm. The rift between the two elements has steadily widened since July.

10. An event which may (or may not) turn out to be a vital turning point occurred on 18 January 1998. At that time various groups in the RS National Assembly, including supporters of Mrs. Plavsic, broke away from earlier alignments and installed Milorad Dodik as Prime Minister of the RS in outright defiance of the SDS. In a speech given that night Mr. Dodik openly rejected the philosophy of the SDS, called upon the RS to comply with "the European Convention on Human Rights as an integral part of the Dayton Agreement," espoused the principle of regional democratic governments throughout the RS, criticized "the previous government" for having "obstructed the Dayton agreement in every way possible," and called for the complete "democratization" of RS society.

11. The possibility that the emergence of Mr. Dodik represents a fundamental change in direction in RS politics (as distinguished from a short-lived effort to influence this arbitration

proceeding) receives support from Mr. Dodik's testimony before this Tribunal. Declaring that he had never been a member of the SDS and had always opposed nationalism, Mr. Dodik described in detail a whole series of reforms that he had managed to put in place within the first 20 days of his elevation, all pointing toward a rejection of SDS principles and future cooperation with the Federation. Although he said he strongly favors keeping Brcko within RS territory, he went on to say that, if nationalist politics were put to one side and Bosnia and Herzegovina became truly democratic, the "IEBL will be an irrelevant issue" -- apparently meaning that the IEBL would cease to have any more political effect than the border between, for example, two internal political districts of a Western European country. He specifically agreed that Bosniacs and Croats should be permitted to return to Brcko and that they should be allowed to control the local administration in Brcko if they earned that right at the ballot box.

12. In the Tribunal's view, the most impressive point made by Mr. Dodik was and is his recognition of the ideal that Bosnia and Herzegovina should become such an integrated multi-ethnic democratic state that the boundary between the two Entities will cease to be relevant. This position suggests the possibility that, if Mr. Dodik survives politically through the RS election scheduled for September 1998 -- and if at the end of the year he and his colleagues in the new RS government still appear to be moving toward his declared objective -- the equities of the situation will be much more evenly balanced than they are today. Conversely, the coming months obviously could bring a very different result: Mr. Dodik may lose his influence or change his position, in which case the RS's claim to exclusive control of the area would be seriously jeopardized.

IV. THE NEED FOR CONTINUING INTERNATIONAL SUPERVISION

13. Since some witnesses at the Vienna hearings called for the immediate termination of the international supervisory regime that was established by the Award, the Tribunal will turn first to the question of whether or not to continue the interim international supervisory regime in the Brcko area.

14. The short answer is that, no matter what ruling the Tribunal might now make on the question of the location of the IEBL, there would be an evident need for continuing international supervision well into the future. Specifically, any change in the status of Brcko (by placing it within Federation territory or creating a "neutral district") would bring with it a need for supervision during the period of adjustment -- and, in light of the RS's continuing course of conduct since Dayton and continuing tensions in the area, the same sort of regime would be required for maintenance of the status quo. In fact, this continuing need has been recognized by senior leaders of both Entities, who have acknowledged that, no matter what the Tribunal's ruling today, some level of international supervision should continue in order to reduce existing tensions in the area. Given Supervisor Farrand's hearing testimony that the new multi-ethnic institutions which he has been nurturing in the Brcko area are still very "shallowly rooted" -- and particularly given the continuing influence of the SDS in the Brcko area -- the need to continue the current supervisory regime for a further period of time seems overwhelmingly clear.[4/] This Supplemental Award provides accordingly.

V. THE TIMING OF A FINAL IEBL DECISION

15. There are powerful arguments in favor of an immediate final ruling on the question of the proper location of the IEBL in the Brcko area -- i.e., whether the area in dispute should be transferred to the Federation, whether it should remain within the territory of the RS, or whether it should be declared a "special" or "neutral district" in the manner forecast in the

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4/ Although the new institutions may be 'shallowly rooted," Ambassador Farrand and his staff have managed to achieve substantial progress, particularly in the last few weeks. A multi-ethnic Municipal Assembly, Administration, and Judiciary are in place; the Returns Commission established by Ambassador Farrand has managed to achieve larger returns of DPs and refugees into the Brcko area than has been accomplished throughout all the rest of the RS; and the multi-ethnic police force under IPTF monitoring is policing significant new traffic over the Brcko highway bridge to Croatia and is now patrolling throughout all areas of the city of Brcko as well as outlying districts. Since all projects are still in the fledgling stage, continuing international supervision is absolutely vital to their continued progress and health.

Award. See Award Para. 103.[3] Some of the considerations are these: (a) the Award contemplated a final decision now; (b) both parties claim that they want such a decision now; and (c) the Tribunal would welcome the opportunity to close the case and dissolve.

16. On the other hand, before bowing to these considerations the Tribunal must consider whether the time is yet ripe for the adoption of what is intended to be "a long term peaceful solution." Award Para. 97. Although some progress has been made, there continue to exist today several of the same factors that prompted the Tribunal a year ago to hold in abeyance the final allocation of political control in the Brcko area. Most importantly, tensions and instability in the region remain high, primarily because of the resistance of the SDS leadership to the Supervisor's efforts to promote Dayton compliance. The Tribunal must also take note of the facts that the joint institutions of Bosnia and Herzegovina have not yet become fully effective and that various Entity institutions are still struggling with organizational problems.

17. Moreover, it seems clear to the Tribunal that a reasonable delay in the IEBL decision is likely to provide the Tribunal with a firmer foundation for selecting the most equitable result. As of this writing, it seems entirely possible, given recent developments, that at the end of the current year there will have been a significant change in the RS government's posture toward Dayton compliance and cooperation with the Federation -- in which event the solution that would be adopted today might well turn out, in hindsight, to have been less equitable than it could have been. To be specific, as of the end of 1997 the circumstances suggested the need for an outright transfer of Brcko to the Federation, which would have given that Entity exclusive control of Brcko when the supervisory regime ends -- and yet

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[3] Although this is not the time to discuss the matter in any depth, the Tribunal has preliminary doubts as to the validity of the RS's repeated suggestions that any "neutral district" solution would violate either the alleged Dayton 51-49 percent principle or the Constitution of Bosnia and Herzegovina or both. We intend to keep an open mind on the issue, but our preliminary analysis indicates that it would be perfectly possible to devise a "neutral district" solution that would not be vulnerable to either criticism.

significant changes in the RS political scenery by the end of 1998 could well make one of the alternative solutions more equitable and more conducive to regional stability over the long run. Recognizing that such a delay will create another period of uncertainty, we nonetheless believe that the potential long-term benefits of a delay, in terms of the equities, are worth the cost of uncertainty for a few more months.

18. It is important to consider whether such a postponement, which would obviously benefit the RS, would be likely to do injury to the interests of the Federation. Our conclusion is that those interests should be well protected in the interim by the multiple shields of the international community. As noted above (see Para. 4, supra), Federation President Ganic's testimony focussed primarily on the interests of all Federation citizens in having former residents of Brcko return to their Brcko homes and in achieving an open economic gateway through Brcko to European markets. Under the Dayton Accords, of course, both interests are completely legitimate, and the Tribunal has every confidence that during the period of delay these interests will be amply protected and promoted by the combined forces of the Supervisor, the new Brcko multi-ethnic governmental institutions (which include a multi-ethnic police force), the IPTF and SFOR. Moreover, the proposed delay may well benefit the Federation: if it provides time for the progressive forces in the RS to gather strength and begin to cooperate with the Federation and the Supervisor's compliance programs, all of Bosnia and Herzegovina will benefit;[4] and, conversely, if the opposite occurs, the Federation's claim to exclusive control of Brcko will be that much

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[4] Just as one example, the press reported on 27 February 1998 that, as a result of new RS attitudes, railroad traffic between the two Entities is starting up for the first time since 1991.

stronger.[2] Indeed, the resulting benefits should continue not only through the postponement period but throughout the period of international supervision and beyond.

19. All things considered, we incline to the view that the final IEBL decision should be deferred until early 1999, at which point the Tribunal will be able to take into account any significant developments that may have occurred in this critical period of change. This Supplemental Award therefore provides for a final arbitration phase at the end of 1998.[3]

20. Referring to the Tribunal's duty to act according to "relevant legal and equitable principles," some may argue that the foregoing rulings are improperly based on purely "political" considerations and lack any adequate basis in law or equity. For reasons previously explained, we disagree. One of the unique qualities of the present arbitration is that it inherently encompasses political considerations, requiring as it does that the Tribunal allocate political responsibilities between the Entities in a manner that will advance the goals of Dayton. Moreover, although the Tribunal has a duty to make a final decision as soon as "that can be done consistent with relevant legal and equitable principles" (Award Para. 102), it should not act until matters have become sufficiently stabilized to allow it to put in place a

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[2] During his hearing testimony President Ganic made a strong argument to the effect that, if uncertainty as to the location of the IEBL is allowed to continue beyond 15 March 1998, (a) economic investment in the area will be delayed, and (b) large numbers of Bosniac former residents of Brcko will decide to abandon any plans for return, with the result that it will no longer be possible to restore the pre-war multi-ethnic balance in Brcko. While acknowledging the force of Mr. Ganic's argument, the Tribunal believes that the outlook for a solid democratic multi-ethnic municipal regime is sufficiently bright today that the relatively brief delay being ordered now will not discourage would-be investors or returnees in significant numbers.

[3] The Tribunal recognizes that the delay of approximately one year creates the risk that if the international community should decide unexpectedly to withdraw its various Bosnian programs, including SFOR, during the year or shortly thereafter -- i.e., shortly after the Tribunal's IEBL decision -- enforcement of the latter decision would be at least problematic. On the other hand, for one year the risk of such withdrawal looks quite remote; there is every reason to believe that the various programs will continue well beyond that point. Such risks will, however, militate strongly against any additional delay beyond early 1999.

solution that is likely to endure over the long term. See Award Para. 101. We therefore think there is both legal and equitable justification for ordering a relatively short delay to collect additional facts relating both to probable future compliance with Dayton and the future relationship between the two Entities.

21. Finally, the Tribunal feels impelled to send an obvious but important message to the RS's political leaders: given the RS's systematic non-compliance with (indeed, defiance of) the Dayton Accords in the Brcko area for much if not all of 1997, the Tribunal's final IEBL decision in late 1998 or early 1999 will surely diminish the RS's position in the Brcko area unless the RS by that time has carried the burden of demonstrating very clearly that it has truly reversed course and committed itself to an apparently permanent program of full Dayton compliance and revitalization of the area. To carry that burden the RS will need to be in a position to show significant new achievements in terms of returns of former Brcko residents, unfettered freedom of movement, strong support for the multi-ethnic governmental institutions including the multi-ethnic police force, and full cooperation with the Supervisor and the authorities responsible for conducting fair and democratic elections in September 1998.[9] Thus, in any subsequent proceeding, the Tribunal will expect to receive from the RS evidence displaying a very vigorous and consistent program of correction and compliance throughout 1998.

22. Although the Federation's responsibilities for Dayton compliance in the Brcko area are of a lesser magnitude (given the present placement of the IEBL) than those of the RS, the Tribunal should warn the Federation that in the final IEBL decision its claims will be weakened by less than full compliance with the obligation to allow former Federation residents to return to their homes, particularly in Sarajevo. See Para. 8, supra.

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[9] A greater understanding of the potential consequences of a failure to achieve these goals may be gained from reviewing the very detailed "Proposed Final Order of the Arbitration Tribunal" that was submitted by counsel for the Federation and served on RS counsel near the conclusion of the present phase of the arbitration.

VI. SUPPLEMENTAL AWARD

23. For the foregoing reasons the Tribunal adopts the following orders and provisions, which shall form part of the Award, shall be binding upon all Parties to GFAP Annex 2, and with which all Parties shall comply and cooperate in full.

24. The supervisory regime established by the Award (at Para. 104(I)(B)) shall continue in existence, with the powers and responsibilities therein provided. The Supervisor, being Deputy High Representative for Brcko, shall enjoy in the Brcko area powers equivalent to those conferred upon the High Representative by the Bonn Conference of December 1997, including the power to remove from office any public official considered by the Supervisor to be inadequately cooperative with his efforts to achieve compliance with the Dayton Accords, to strengthen democratic institutions in the area, and to revitalize the local economy.

25. The Supervisor is authorized and encouraged to take appropriate measures toward economic revitalization, including steps (a) to re-integrate the economy of that portion of the pre-war Brcko Opstina that lies north of the IEBL with the economies of surrounding regions, (b) to create in the Brcko area a duty-free or special economic zone to stimulate the region's economy, (c) for the same purpose to establish a program of privatization of state-owned and socially-owned enterprises in the area, and (d), looking toward the re-opening of the Sava River port in Brcko, to activate the Bosnia and Herzegovina Transportation Corporation and facilitate international support for the port program.

26. Pending further action by the Tribunal, to be taken upon the request of either party, the IEBL within the pre-war Brcko Opstina shall remain unchanged. The Tribunal will entertain and act upon any such request that is received between 15 November 1998 and 15 January 1999. A further decision by the Tribunal in response to such a request will be rendered as soon as possible after the request has been received.

27. The Tribunal hereby gives notice (1) that any further Tribunal action is likely to be significantly affected by the degree to which the respective parties have acted in good faith to comply with the Dayton Accords and the Tribunal's orders, and (2) that among the alternative solutions that will be seriously considered by the Tribunal, upon proper request, will be (a) the location or relocation of the IEBL in such a way as to place Brcko and its surroundings within the territory of one party or the other, and (b) the conversion of the pre-war Brcko Opstina into a "neutral district" beyond the exclusive control of either Entity.

VII. AUTHENTICITY

28. The English language text of this Supplemental Award shall be the authentic text for all purposes.

Robert B. Owen
Presiding Arbitrator

Cazim Sadikovic
Arbitrator

Vitomir Popovic
Arbitrator

15 March 1998